No. 10-421

In the

Supreme Court of the United States

DEUTSCHER TENNIS BUND, ROTHENBAUM SPORTS GMBH AND QATAR TENNIS FEDERATION,

Petitioners,

v.

ATP TOUR, INC., ETIENNE DE VILLIERS, CHARLES PASARELL, GRAHAM PEARCE, JACCO ELTINGH, PERRY ROGERS, AND IGGY JOVANOVIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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QUESTION PRESENTED

Did the Court of Appeals correctly affirm the jury's rejection of Petitioners' Sherman Act Section 1 claim where the District Court found that there were factual and economic disputes precluding a "Quick Look" analysis of the changes to the format, rules and structure of Respondent's tennis circuit and where the jury found that Petitioners failed to prove their asserted relevant market for "top-tier" player services in any event?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The caption contains the names of all parties to the proceeding below. Respondent ATP Tour, Inc. is a non-profit, Delaware non-stock membership corporation. No publicly held company owns 10% or more of ATP Tour, Inc.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

INTRODUCTION

The decision of the Third Circuit unanimously affirming a jury verdict in favor of Respondent ATP Tour, Inc. ("ATP") is premised on a basic principle of antitrust law: where a plaintiff fails to establish any relevant market – and indeed where a jury specifically so finds – the plaintiff loses. That is what happened here.

The efforts by Petitioners Deutscher Tennis Bund ("DTB") and Qatar Tennis Federation ("QTF") (together, the "Federations") to recast this case are

without basis factually or legally. In all events, the Federations do not raise any determinative or fundamental legal issues under the antitrust laws that could save their failed lawsuit, much less identify any issue on which there is a conflict among the circuits.

After a two-week trial, and a full presentation from all of the Federations' fact and expert witnesses, the Federations failed to prove any of their antitrust claims against the ATP. The jury found in its special verdict that the Federations failed to prove an essential element of their case – namely the supposed existence of a self-proclaimed market for "top player services" (which the Federations posited at trial solely for purposes of this case).

The Third Circuit correctly affirmed the jury's verdict under well-settled antitrust law. No further review of the jury's verdict, or of the Third Circuit's affirmance, is warranted.

The Federations did not, and do not, challenge the sufficiency of the evidence supporting the jury's verdict. Instead, the Federations seek to avoid the jury's finding by insisting that that the jury should have been instructed to conduct a Quick Look review and that a Quick Look review would have permitted the jury to find a Section 1 violation despite the Federations' failure to prove the existence of a relevant market – let alone any anticompetitive market impact. The Federations are wrong.

First, every Section 1 claim is premised on the threat of "anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Quick Look is not a separate species of Section 1 violation that dispenses with the

fundamental requirement of market impact. Quick Look is merely a mode of analysis that applies when the market impact is so "obvious" that an extensive market analysis is unnecessary. *Id.* The Federations' own supposed Quick Look jury instructions expressly assumed a finding of "substantial harm to competition in a relevant market" from the challenged conduct. Opp. App. 16a-17a. Market impact is not "obvious" – and therefore Quick Look does not apply – where, as here, the very existence and contours of the claimed market were hotly contested and factually disputed – so much so, in fact, that the jury found the Federations' proof lacking after considering all of the evidence presented. *See, e.g.*, *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004).

The Third Circuit applied these basic principles of antitrust law to the facts at hand. The Federations do not dispute that their self-proclaimed "top player services" market was vigorously contested and that its boundaries were found to be "ambiguous." Pet. App. 20a. (Indeed, the Federations affirmatively argued that the case presented "immensely complicated" issues requiring an "extremely careful and nuanced analysis" of evidence to assess market definition and competitive effects. Opp. App. 28a.)

Standing alone, such disputes over the market preclude any finding of the "obvious" anticompetitive impact on "markets and consumers" that is necessary for a truncated, Quick Look review. In addition, the Third Circuit correctly concluded that restraints within sports leagues are not naked restraints on price or output (or other inherently suspect conduct) in any event because such

restraints "are essential if the product is to be available at all." Pet. App. 20a (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984)). Even now, the Federations do not claim that the challenged conduct resulted in any reduction in output or increase in price in any market, however described. Thus, fundamentally, this was never a Quick Look case.

Given the market complexities, and the lack of any naked restraint or inherently suspect conduct, the Third Circuit correctly concluded that Quick Look was inapplicable to the Federations' claims. Pet. App. 20a-21a. The speculation by the Third Circuit, in *dicta*, that some of the challenged tour rules "might" have an (unproven) impact on an undefined "player services" market is insufficient on its face to invoke Quick Look. The possibility of impact on a market indicates nothing more than that, as in any Rule of Reason case that goes to a jury, the potential competitive impacts were to be proven and weighed. The Third Circuit's speculation is irrelevant in any event because the Federations strategically chose to rest their claims on a supposed "top-tier" player services market that they never proved.

Second, the Federations' request for review makes no sense given the jury's rejection of their theory on the facts. Where applicable, Quick Look is a procedural device to shortcut a "detailed" market analysis because of the self-evident impact on markets and consumers. *Cal. Dental*, 526 U.S. at 770. Here, the Federations failed to prove their relevant market after a full, two-week trial. While Quick Look may be useful to resolve some claims expeditiously without submission to a full trial, it

cannot be used, after the fact, to excuse a failure of proof after a full and fair opportunity to prove Section 1 claims at trial. The supposed anticompetitive effects on consumers and markets cannot be more obvious with less proof and analyis.

Third, because this case fundamentally is not a Quick Look case, none of the supposed Circuit splits on Quick Look that the Federations claim are relevant. In any event, the alleged Circuit splits do not exist. The Third Circuit's analysis is entirely consistent with the settled precedent in actual Quick Look cases.

Fourth, even if the disputed and ultimately unproven nature of the "top player services" market could be ignored, the Federations never moved the District Court under Fed. R. Civ. P. 56 before trial or Fed. R. Civ. P. 50 during or after trial to apply a Quick Look analysis. The Federations only proposed Quick Look jury instructions. Where applicable, Quick Look is a procedural device used by the court. The Federations do not cite a single case holding that Quick Look is a jury question. Review of the Third Circuit's Quick Look discussions would be imprudent because the Federations' procedural default would preclude recovery under Quick Look even were that the correct mode of analysis.

Finally, even if this were a Quick Look case, the Federations' claims fail independently for, among other deficiencies, lack of antitrust standing and failure to prove antitrust injury. Both are requisite elements to recovery under the Sherman and Clayton Acts by private litigants such as the Federations. Although the Third Circuit had no need to address these additional, fatal flaws in the

Federations' Section 1 claims, both issues were fully preserved for appeal.

STATEMENT OF THE CASE

ATP is a non-profit membership corporation comprised of men's professional tennis tournaments and players. ATP operates an annual men's professional tennis circuit in dozens of cities around the world (the "Tour").

The Federations are ATP members that together own an ATP tournament in Hamburg, Germany. The QTF also owns an ATP tournament in Doha, Qatar.

In 2007, ATP's Board of Directors voted to modify the format of the Tour under ATP's "Brave New World" plan ("BNW"). BNW was implemented in response to consumer demand to make the Tour more interesting, more exciting, easier to follow, and more competitive with other sports and entertainment offerings. Among other things, BNW increased compensation (prize money) to players, improved travel schedules between tournaments, and improved the quality of the facilities by increasing investment in new and existing stadia. BNW also sought to offer consumers more and better quality events and a more coherent ranking system.

As part of BNW, the Federations submitted an application to ATP seeking to have the Hamburg tournament selected as one of the nine Tour events offering winners 1,000 ranking points. The Board denied the Federations' application for a "1,000" designation, and instead designated the Hamburg tournament as a "500" point tournament (keeping the tournament within the top third of the Tour's events).

A. The Federations Sought to Prove a Restraint on an Alleged "Top Player" Services Market.

The Federations sued ATP and the individual Board members who voted to reject the Federations' application. The Federations alleged claims under Sections 1 and 2 of the Sherman Act, as well as various state law claims.

The Federations' antitrust claims alleged, in relevant part, that ATP had restrained the input "market for player services for top-tier men's professional tennis."[1] Opp. App. 20a-27a. The existence and contours of this professed market were among the most hotly contested factual issues at trial. Pet. App. 20a.

B. The Jury Rejected the Federations' Antitrust Claims After a Two Week Trial, Finding Insufficient Proof of the Alleged "Top Players" Market.

The Federations' claims were tried to a jury over the course of more than two weeks. The Federations presented their theory of the case through the direct and cross examination of more than fifteen fact witnesses and four economics and damages experts and the presentation of nearly 1,000 exhibits.

ATP's Board members moved for judgment as a matter of law on the Section 1 claims brought against them individually. The Board members argued that they could not be liable absent a *per se*

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[1] The Federations also sought to prove an output market for "top-tier men's professional tennis" and an input market for "sanctions for top-tier men's professional tennis events. Opp. App. 20a.

Section 1 violation and that the Federations had failed to prove any *per se* violation. The District Court agreed, finding that:

> "The complexity of these particular arrangements, the peculiar industry of sports, and the ambiguity of the bounds of the relevant market, all counsel against treating the business practices in dispute here as per se violations of antitrust law."

The District Court further held that:

> "The evidence adduced by the plaintiffs in this case could perhaps be evidence of certain illegalities, that is, antitrust violations, but only after one engaged in a detailed examination of the industry in question, and, furthermore, only after taking the industry in question to be top-tier men's professional tennis, rather than, for example, professional sports or spectator sports more generally."

Pet. App. 44a.

The Federations never moved for judgment as a matter of law under Fed. R. Civ. P. 50 to have the District Court condemn ATP's challenged conduct under a Quick Look analysis (although any such motion would have failed given the evidence and the subject matter of the Federations' challenge). The Federations instead merely proposed supposed Quick Look jury instructions (without citing a single case holding that Quick Look can be applied by a jury). Yet, tellingly, the Federations' own proposed instructions expressly presumed findings of "significant competitive harm" in "relevant markets" from the challenged conduct even though the District Court had never been asked to make such findings. Opp. App. 16a.

ATP objected to the proposed instructions, including on the ground that Quick Look is not a jury issue and that the prerequisites for Quick Look were absent. Opp. App. 16a-19a.

The District Court held that it would be "inappropriate" to give the proposed Quick Look instructions in light of its findings that the complexities of the industry and the ambiguous nature of the relevant market precluded any conclusion that the challenged conduct was obviously anticompetitive. Pet. App. 50a. Instead, a "detailed" examination of the industry was needed, including consideration of whether any analysis could be limited to "top tier" tennis, as the Federations had urged. *Id.*

The District Court instructed the jury to analyze the Federations' Section 1 claims under a Rule of Reason analysis. This included instructions with respect to proof of the posited "top-tier" player services market. Opp. App. 20a-27a. (The same relevant market instruction was given with respect to both the Section 1 and Section 2 claims. *Id.*)

After deliberations, the jury returned a special verdict that rejected the Federations' claims. The jury found that the Federations had failed to prove any requisite "agreement." Opp. App. 2a. It also found that the Federations failed to prove any relevant market. Opp. App. 6a, 9a, 12a. As such, the jury rejected both the Section 1 and the Section 2 claims.

The Federations did not file any post-trial motion to challenge the jury's finding that the Federations failed to prove a relevant market.

C. The Third Circuit Unanimously Affirmed the Jury Verdict.

The Federations appealed the judgment with respect to the failed Section 1 claims against ATP. The Federations did not appeal the jury verdict rejecting their Section 2 claims.

The Third Circuit unanimously affirmed the jury's verdict and the resulting judgment.[2] Pet. App. 3a. The Third Circuit found that the jury's finding of no relevant market with respect to the Section 2 claims was equally applicable to, and doomed, the Section 1 claims because the claims rested on identical proposed market definitions. Pet. App. 11a-12a n.5, 12a n.6, 33a.

The Third Circuit rejected the Federations' arguments that the District Court should have instructed the jury under a Quick Look analysis and that such analysis would have relieved the Federations of their failure of proof on a relevant market. The Third Circuit affirmed that Quick Look was inappropriate given, among other things, the substantial, factual disputes as to the Federations' claims of a "top player services" market to this case:

> "Although the Federations contended the Brave New World Plan restrained the 'top player services' market, the definition of the relevant market was one of the most contested issues at trial – so much so that after all the evidence was presented the District Court saw the bounds of

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[2] The Third Circuit also affirmed the antitrust and fiduciary duty claims against the individual Board members. Pet. App. 23a-24a n.8, 34a-41a.

> the relevant market as 'ambiguous.' Because 'the contours of the market' here are not 'sufficiently well known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition,' 'quick look' is not appropriate and proof of relevant market is required under full-scale rule of reason."

Pet. App. 20a-21a (quoting *Worldwide Basketball*, 388 F.3d at 961).

The Third Circuit also reasoned, in *dicta* not essential to the judgment, that even if Quick Look had been applied initially, ATP's substantial evidence of the procompetitive effects of BNW would have required the jury to undertake a full-scale Rule of Reason analysis. Pet. App. 22a-23a. Thus, any error the District Court made in not applying Quick Look ultimately was harmless. *Id.*

REASONS FOR DENYING THE PETITION

The Third Circuit correctly affirmed the verdict and judgment. It did so by applying standard, long-settled antitrust law to the jury's finding of fact. No further review by this Court is required.

I. The Third Circuit Applied Well-Established Antitrust Law Precluding a Quick Look Analysis Given the Disputed, and Ultimately Unproven, "Top Player Services" Market as well as the Lack of Inherently Suspect Conduct.

The Federations indisputably failed to prove the existence of the market on which they chose to rest their Section 1 claims – namely, a vaguely defined "top-tier" player services market. The Federations do not challenge the jury instructions concerning their posited market. Nor do they claim that they were unlawfully barred from presenting their best

evidence of such a market. They also do not dispute that, under a Rule of Reason analysis, the failure to prove a relevant market precludes Section 1 liability as a matter of law.

Instead, each of the Federations' arguments for review presumes that, if a Quick Look analysis were used, the failure to prove a "top-tier" player services market somehow could be ignored. Respectfully, the Federations have it exactly backwards. This was never a Quick Look case given the lack of any naked restraint, inherently suspect conduct, or obvious anticompetitive market impact. The Federations cannot remake it into a Quick Look case *post hac* to avoid their failed trial strategy and the consequent jury finding. Quick Look is a procedural device used to cut to the chase when the anticompetitive effects on a posited market are obvious, not to ignore a jury finding that a market is so *un*obvious that it was not proven after a two week trial.

The antitrust principles applied by the Third Circuit are clear and long-settled.

First, every Section 1 claim is premised on harm or threatened harm to a market. This Court has made clear that the categories of *per se*, Quick Look, and Rule of Reason are merely modes of analysis along a continuum. *Cal. Dental*, 526 U.S. at 780-81 ("[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.") Each mode of analysis ultimately is concerned with anticompetitive impacts on actual "customers and markets." *Id.* at 770; *Texaco, Inc. v.*

Dagher, 547 U.S. 1, 5, 7 n.3 (2006) (finding *per se* and Quick Look inapplicable given lack of competition between joint venturers "in the relevant market"); *Bd. of Regents*, 468 U.S. at 104 n.26 ("Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."). Thus, while different depths of analysis may be "meet for the case" depending on the particular "circumstances, details, and logic" of the challenged conduct (*Cal. Dental*, 526 U.S. at 780-81), the various modes of analysis do not change the elements of a Section 1 claim – including the need for "market" effects and, therefore, for a cognizable market.

Second, as a corollary to the above, Quick Look does not eliminate the basic Section 1 requirement of anticompetitive impact in a relevant market. *See* ABA Sec. of Antitrust Law, *Antitrust Law Developments* 65 (6th ed. 2007) ("Without defining the relevant market, there is no meaningful context within which to assess the restraint's potential competitive effects."). To the contrary, as the Third Circuit correctly explained, the threshold requirement for a Quick Look analysis is that "the anticompetitive effect on customers and markets" must be so obvious that no elaborate or detailed analysis is needed. Pet. App. at 17a (citing *Cal. Dental*, 526 U.S. at 770). The Federations clearly recognized this when they proposed Quick Look jury instructions that included a threshold finding of impact in a "relevant market." Opp. App. 16a-17a.

Third, given the prerequisites for a Quick Look analysis, where the relevant market is ambiguous or there are disputes over its contours, Quick Look is not appropriate. *Worldwide Basketball*, 388 F.3d at

961 (rejecting Quick Look and remanding for Rule of Reason review where market was "neither obvious nor undisputed" and plaintiff failed to account for market alternatives); *MLB Properties Inc. v. Salvino*, 542 F.3d 290, 332-34 (2d Cir. 2008) (Quick Look inappropriate where no proof of impact on output); *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 209-10 (3d Cir. 2005) (Quick Look inappropriate for non-price vertical restraints where market effects are not obvious). In such a case a more detailed inquiry into the nature of the posited market and the impact, if any, of the challenged conduct on that market is required.

Finally, the Federations ignore that neither the District Court nor the Third Circuit concluded that there was any self-evident anticompetitive impact on the posited (but vague and unproven) "top player services" market. Although the Third Circuit also discussed general concepts concerning a market for "player services," the jury instructions confirm that is not a market that the Federations posited at trial. Opp. App. 20a-27a. In any event, neither the District Court nor the Third Circuit found the self-evident anticompetitive effect in such a market required for a Quick Look case, let alone any naked restraint or other inherently suspect conduct. At best, the Court of Appeals speculated that there "might" have been an impact on a market. That clearly is not close to a finding of an actual, obvious impact necessary for Quick Look. The Third Circuit's comment is nothing more than the observation that, as in any Rule of Reason case that goes to a jury, there may be competitive impacts for the jury to find and to weigh.

II. There is No Circuit Split on the Requirement of a Relevant Market for a Quick Look Analysis.

Because this never was and is not now a Quick Look case (and because the Federations failed to preserve any claim to Quick Look treatment), review is not necessary to resolve any alleged "circuit split" concerning the role of relevant markets in Quick Look cases. In any event, the Third Circuit adhered to established Section 1 and Quick Look principles. The Federations manufacture a "split" based on tortured readings of excerpts from opinions divorced from their context. None of the cases cited by the Federations conflict with the Third Circuit's ruling.

In *Cal. ex rel. Brown v. Safeway, Inc.*, ___ F.3d __, 2010 WL 3222187 (9th Cir. Aug. 17, 2010), the Ninth Circuit applied Quick Look to an agreement among a group of supermarket competitors to share profits during a labor strike. The court held this agreement between competitors created "a great likelihood of anticompetitive effects" by creating a "negative effect on their incentives to compete with one another for customers." *Id.* at *11-12. The Ninth Circuit identified the group's "60% or 70% of the market share" of the "Southern California [grocery] market" as a significant factor in its finding of likely anticompetitive effects of the agreement between competitors. *Id.* at *13.

The Ninth Circuit's holding in *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440 (9th Cir. 1988) did not involve a Quick Look approach. Nonetheless, that case also cited the defendant's 84% market share as a persuasive factor in affirming a directed verdict that the relevant market was the market for anesthesia services in Helena. *Id.* at 1442, 1447. The record in *Oltz* contained evidence of actual

anticompetitive effects in that market through a reduction in output and a corresponding increase in consumer prices. *Id.* at 1448. By contrast, the Third Circuit here held the record evidence was insufficient to demonstrate actual anticompetitive effects "without the aid of extensive market analysis." Pet. App. 20a-21a (quoting *Worldwide Basketball*, 388 F.3d at 959).

In *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005), the D.C. Circuit reviewed the FTC's determination that competitors who had entered a joint venture violated Section 5 of the Federal Trade Commission Act by agreeing to enact price restrictions and limit advertising on their own products that competed with the joint venture's product. The D.C. Circuit agreed with the FTC that appellants "failed to identify any competitive justification" for conduct that "looks suspiciously like a naked price fixing agreement between competitors." 416 F.3d at 37-38. The court held that this conduct was sufficiently suspect to presume "a deleterious effect upon consumers" because "agreements restraining autonomy in pricing and advertising impede the 'ordinary give and take of the market place.'" *Id.* at 37 (citing *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1987)). The D.C. Circuit did not, however, find that the determination of a relevant market (or, as here, a jury's determination that the alleged relevant market has not been proven) has no significance in a Quick Look analysis.

Likewise, in *Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998), the Tenth Circuit found an agreement among NCAA member institutions to limit the salaries of assistant basketball coaches "constitutes the type of naked horizontal agreement

among competitive purchasers to fix prices usually found to be illegal *per se*" but applied Quick Look because horizontal restraints were necessary to produce the product of college basketball. "No 'proof of market power' is required where the very purpose and effect of a horizontal agreement is to fix prices so as to make them unresponsive to a competitive marketplace." *Id.* at 1020 (citing *Bd. of Regents*, 468 U.S. at 110). Nowhere did the Tenth Circuit hold, as the Federations suggest, that a jury's factual finding that a plaintiff failed to prove a relevant market is irrelevant under a Quick Look analysis.

III. The Federations Did Not Move for Quick Look Treatment in the District Court.

Even if the substantive parameters for Quick Look existed, the Federations never made any motion for judgment as a matter of law under Fed. R. Civ. P. 50 for the District Court to condemn the ATP's BNW under Quick Look. Instead, they merely proposed supposed Quick Look jury instructions. Opp. App. 16a-19a. The Federations' strategic choices resulted in procedural defaults that preclude review of any Quick Look issues.[3]

First, Quick Look is not a jury issue. It is a "procedural device" used by courts to assess whether "inherently suspect" conduct should be condemned as unlawful by the court without a plenary trial or, instead, assessed by a jury under a full Rule of

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[3] Although the Third Circuit's conclusions obviated the need to address the Federations' procedural defaults, ATP preserved this issue for appeal. ATP raises this issue here to preserve it for its potential merits brief. *Alabama v. Shelton*, 535 U.S. 654 (2002).

Reason analysis. *Antitrust Law Developments* 59-60. As the ABA Model Jury Instructions in Civil Antitrust Cases explains, "because application of the quick look analysis is a question of law to be determined by the court," there are no jury instructions for Quick Look. ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases A-8, n.2 (2005). Leading commentators likewise confirm that Quick Look is an analysis "to enable *the court* to make a judgment on reasonableness." Areeda & Hovenkamp, *Antitrust Law*, ¶ 1914(d) at 355-356 (2d ed. 2005) (emphasis added).

Second, the jury instructions that the Federations proposed were expressly premised on the District Court first making findings that "as a matter of law . . . these restraints constitute . . . naked restraints of trade" resulting in "significant competitive harm." Opp. App. 16a. But, in fact, the Federations had never made any motion asking the District Court to make such determinations "as a matter of law." Thus, even if Quick Look were a jury issue and not simply a procedural tool for the courts, the Federations failed to seek the threshold court findings "as a matter of law" on which their own jury instructions were premised. As explained above, the District Court found that, on the evidence presented at trial, the market definitions, dynamics, and competitive effects were too complex and non-obvious to warrant either *per se* or Quick Look treatment.

Finally, the Federations also are precluded from attacking the sufficiency of the evidence supporting the jury's special verdict on relevant markets because they failed to make the requisite Rule 50

motions below. *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-402 (2006).

IV. The Burden of Proof Under Quick Look and the Analysis of Competitive Impacts on Related Markets Are Irrelevant Here and In All Events Correctly Stated by the Third Circuit.

The Federations incorrectly claim that (a) Quick Look puts the burden on the antitrust defendant to establish procompetitive justifications that outweigh the presumed anticompetitive effects (Pet. at 34) and (b) that Section 1 myopically focuses solely on alleged competitive impacts to the plaintiff's chosen market – and prohibits courts and juries from considering procompetitive justifications in any other market, including related markets (Pet. at 15-22). Neither argument is relevant given the Federations' failure to prove any relevant market. The Federations are wrong on both counts in any event.

With respect to the burden of proof, none of the cases the Federations cite even reach this issue. The Third Circuit accurately stated (in *dicta*) that it was the Federations' burden to establish that BNW's alleged anticompetitive effects outweighed the procompetitive benefits that ATP established.

This Court held in *Cal. Dental* that, upon a showing of an "obvious" likelihood of anticompetitive effects, "quick look analysis in effect requires" a court to "shift[] to a defendant the burden to show empirical evidence of procompetitive effects." 526 U.S. at 775 n.12. This is a burden of production, not a burden of proof. This Court has never held that a defendant bears the burden to show "empirical evidence of procompetitive effects" *outweigh* the presumed anticompetitive effects. *See also* Areeda & Hovenkamp, ¶ 1914(d) at 356 ("[I]f a proper

competitive justification is adequately demonstrated [by the defendant]...the burden of showing market power and presumed or actual anticompetitive effects falls on the plaintiff....").

The Federations themselves proposed that the jury be instructed that "[t]he challenged restraint is illegal under Section 1 of the Sherman Act if you find that the competitive harm outweighs the competitive benefit," (Opp. App. 16a.) and that, "[i]f the competitive harm outweighs the competitive benefits, then the challenged restraint is unreasonable. If the competitive harm does not outweigh the competitive benefits, then the challenged restraint is not unreasonable." Opp. App. 19a. In short, the Federations' own proposed instructions confirmed that the burden of proof remains on the antitrust plaintiff to show that anticompetitive effects outweigh competitive benefits.

The two cases the Federations rely on to frame a purported "circuit split" are not to the contrary. Neither *Safeway*, *supra*, nor *Polygram*, *supra*, reached the issue of who bears the burden under Quick Look with respect to balancing the competitive effects of an alleged restraint. In both cases, the defendant failed to establish evidence of *any* legitimate procompetitive effects.

In *Safeway*, the Ninth Circuit quoted *Cal. Dental* in describing the Quick Look burden of the defendant grocery stores to produce evidence of procompetitive effects of their agreement to share profits during a labor dispute. 2010 WL 3222187 at *9, 16. The Ninth Circuit found that the only "benefit" the defendants offered was that the profit sharing agreement would help them win their labor dispute,

which in turn would allow them to pay lower wages, and in turn offer lower prices to consumers. The Ninth Circuit rejected this argument, holding that "driving down compensation to workers is not a benefit to consumers cognizable under our laws as a 'procompetitive' benefit." *Id.* at *17. Because the "defendants offer[ed] no plausible procompetitive benefits," the Ninth Circuit did not reach the issue of who bears the burden of weighing procompetitive and anticompetitive effects under Quick Look. *Id.* at *5.

Similarly, in *Law*, the Tenth Circuit articulated the defendant's burden under Quick Look: "Once the plaintiff meets that burden [of establishing anticompetitive effects]...the burden shifts to the defendant to justify the restraint as a 'reasonable' one." 134 F.3d at 1021. In describing the defendant's burden to "justify the restraint," the Tenth Circuit distinguished the Fifth Circuit's holding in *Hennessy v. NCAA*, 564 F.2d 1136, 1153-54 (5th Cir. 1977), in which the Fifth Circuit "admittedly border[ed] on speculation" in presuming the reasonableness of an NCAA rule capping the number of assistant basketball and football coaches so as to avoid "foreclose[ing], by way of injunction, any opportunity to build up experience on which the issue could ultimately be judged." *Law* held that the defendant NCAA failed to establish any evidence of procompetitive effects, not – as the Federations suggest – that the defendant failed to prove the procompetitive effects outweighed the anticompetitive effects. 134 F.3d at 1022-1024.

The Federations also wrongly claim that the Third Circuit created a "conflict" when it observed that ATP's evidence of procompetitive benefits in

"the sports and entertainment market" could be weighed by a jury against the Federations' claimed evidence of anticompetitive impacts on their asserted input market for "top player services."

First, again, the Third Circuit's observation was *dicta* not necessary to its holding given the Federations' failure of proof as to any relevant market.

Second, the case law is clear that a competitive analysis is not strictly limited to one market and, instead, should include consideration of related markets. *See, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19, 54-55 (1977) (recognizing that positive effects on interbrand competition can justify anticompetitive effects on intrabrand competition, even though "the degree of intrabrand competition is wholly independent of the level of interbrand competition."); *Bd. of Regents*, 468 U.S. at 115-20 (considering the NCAA's interest in protecting live attendance at untelevised games and the NCAA's "legitimate and important" interest in maintaining competitive balance between amateur athletic teams as a justification for asserted restraint on the market for the telecasting of collegiate football games); *Sullivan v. NFL*, 34 F.3d 1091, 1111-13 (1st Cir. 1994) (noting that cases from Supreme Court and Circuits have looked to procompetitive benefits beyond the relevant market where the benefits in one market are related to another) (citing, *inter alia*, *Continental T.V.*, *supra*, *Bd. of Regents*, *supra* and *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1404-1405 (9th Cir. 1984)); *Toscano v. PGA Tour*, 201 F. Supp. 2d 1106, 1121 (E.D. Cal. 2002) (rejecting Quick Look review when the PGA proffered evidence that its eligibility rules had the procompetitive effect of "ensur[ing] that spectators

see the marquee players they want to see thereby helping to attract sponsors who ultimately finance the Senior PGA Tour and create the product.").

Finally, the Federations ignore the evidence that ATP presented at trial of the vast array of procompetitive benefits that BNW would have in the production of men's tennis events, including increased player compensation, better travel schedules (protecting player health), increased investment in facilities, increased geographic reach of the Tour, increased and better quality broadcasting, and an easier to understand and more exciting overall format for the Tour season. Pet. App. 22a. ATP brought forth this evidence of wide-ranging procompetitive effects of BNW in the face of the Federations' assertion of restraints in three vaguely defined alleged relevant markets: the market for "top player services," the market for "top-tier men's professional tennis events," and the market for "sanctions for top-tier men's professional tennis events." Opp. App. 201. Nevertheless, as this Court recently stated in *Am. Needle, Inc. v. Nat'l Football League*, __ U.S. __, 130 S. Ct. 2201, 2216-17 (2010), a sports league's interest "in making the entire league successful and profitable" can justify many restraints within the league and its input markets.

V. The Federations Failed to Prove Additional Prerequisites to Recovery.

Review of this case also would be of no practical utility because, even if the Federations could overcome their fundamental failure of proof of a relevant market under a Quick Look approach, their claims fail for additional, independent reasons.

Specifically, the Federations failed to prove that they had suffered any antitrust injury or possessed antitrust standing. Proof of both antitrust injury and antitrust standing are required to prevail on a Section 1 claim. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977) (antitrust injury); *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538-40 (1983) (antitrust standing). The Federations' failures of proof are dispositive of any appeal.[4]

It was the Federations' burden to prove that they had suffered "antitrust injury" – *i.e.* injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. The only injury they alleged was not injury to competition, but injury to the Federations as competitors for "top player services." A key executive for the Federations made this absolutely clear at trial when he testified that the Federations' goal in the lawsuit was not to challenge an anticompetitive system of player allocation, but to remain as a top-tier event within the Tour. Opp. App., 29a-30a. The Federations did not allege, and the jury did not find, the existence of any barriers that would prevent the Federations or any other potential competitor from "competing for players by forming a competitive league." *Mid-South Grizzlies v. NFL*, 720 F.2d 772, 787 (3d Cir. 1983). Indeed, if BNW had resulted in any restraint on

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[4] Although the Third Circuit's conclusions obviated the need to address the Federations' lack of antitrust standing and antitrust injury, ATP preserved both issues for appeal and does so here to preserve them for any review by this Court. *Shelton*, 535 U.S. 654.

compensation to the players, that restraint would have made it easier for the Federations and others to form a competitive league and offer the players greater compensation. Even more fundamentally, where no market has been proven, a party plainly has no injury and no standing to recover. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 140 (3d Cir. 2001) (no "antitrust injury unless the activity has a wider impact on the competitive market.")

The Federations also were required to prove "antitrust standing" by showing that their alleged injuries were "the type that the antitrust statute was intended to forestall" and that the Federations were appropriate parties to seek redress. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538-40 (1983); *Cargill v. Monfort of Col.*, 479 U.S. 104, 110 n.5 (1986) ("[A] party may have suffered antitrust injury but may not be a proper party under § 4 for other reasons."). Any alleged claim that ATP restricted a market for "top player services" would be more directly brought by the players whose ability to market their services allegedly would have been constrained.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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OCTOBER 27, 2010

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

[Filed 10/03/2008]

Civil Action No. 07-178 GMS

DEUTSCHER TENNIS BUND *et al.*,
Plaintiffs,

v.

ATP TOUR, INC. *et al.*,
Defendants.

JUDGMENT

This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict on August 5, 2008. The verdict was accompanied by a verdict form (D.I. 195), a copy of which is attached hereto. Therefore,

IT IS HEREBY ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the defendant, ATP TOUR, INC., and against the plaintiffs, DEUTSCHER TENNIS BLIND, ROTHENBAUM SPORTS GMBH AND QATAR TENNIS FEDERATION.

Dated: October 3, 2008

/s/ Gregory M. Sleet
CHIEF, UNITED STATES DISTRICT JUDGE

SHERMAN ACT § 1

WE, THE JURY, unanimously find as follows:

1. Have Plaintiffs proven by a preponderance of the evidence that the Defendant entered into contract(s), combination(s) or conspiracy(ies) with any separate entity or entities? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 2 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 1 Yes ___ No _X_

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify all parties to each such agreement:_____

2. Have Plaintiffs proven by a preponderance of the evidence the existence of a relevant product market within a relevant geographic market? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 3 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 2 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify each relevant product market and the associated geographic market:_____

3. Have Plaintiffs proven by a preponderance of the evidence that any contract, combination or conspiracy that you found in question 1 had a harmful effect on competition in a relevant product and geographic market(s)? (A "yes" answer to this ques-

tion is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 4 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 3 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated relevant product and geographic market(s): _____

4. Do you find by a preponderance of the evidence that any contract, combination or conspiracy for which you answered "Yes" to question 3 had procompetitive benefits? (A "yes" answer to this question is a finding for the Defendant. A "no" answer is a finding for Plaintiffs. If "yes," proceed to question 5 below. If "no," proceed to question 7 below.)

Question 4 Yes ___ No ___

(for Plaintiffs) (for Defendant)

5. Do you find by a preponderance of the evidence that any contract, combination or conspiracy for which you answered "Yes" to question 4 was reasonably necessary to achieve the procompetitive benefits you found? (A "yes" answer to this question is a finding for the Defendant. A "no" answer is a finding for Plaintiffs. If "yes," proceed to question 6 below. If "no," proceed to question 8 below.)

Question 5 Yes ___ No ___

(for Plaintiffs) (for Defendant)

6. Have Plaintiffs proven by a preponderance of the evidence that the harmful effect on competition of any contract, combination or conspiracy for which you answered "Yes" to question 5 substantially

outweighs the procompetitive benefits you found? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 7 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 6 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated relevant product and geographic market(s): _____

7. Do you find by a preponderance of the evidence that the contract(s), combination(s) or conspiracy(ies) the Defendant entered was or were a material cause of any injury to the Plaintiffs in their business or property? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question .8 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 7 Yes ___ No ___

(for Plaintiffs) (for Defendant)

8. For any injury you found in response to question 7, do you find by a preponderance of the evidence that any such injury to Plaintiffs was caused by a reduction in competition, acts that would lead to a reduction in competition., or acts that would otherwise harm consumers? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 9 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 8 Yes ___ No ___

(for Plaintiffs) (for Defendant)

9. For any injury for which you answered "Yes" to Question 8, do you find by a preponderance of the evidence that Plaintiffs failed to take all reasonable steps available to minimize their losses? (A "yes" answer to this question is a finding for the Defendant. A "no" answer is a finding for Plaintiffs. If "no," proceed to question 10 below and do not answer question 11. If "yes," please proceed to question 11 below and do not answer question 10.)

Question 9 Yes ___ No ___

(for Plaintiffs) (for Defendant)

10. For any injury for which you answered "No" to question 9, what is the total amount of damages that would fairly compensate Plaintiffs for this injury based on the evidence available to you? Write your answer in the line labeled "Amount" below.

11. For any injury for which you answered "Yes" to question 9, what is the total amount of damages that would fairly compensate Plaintiffs for this injury if they had take all reasonable steps to mitigate their damages? Write your answer in the line labeled "Amount" below.

Amount: _____

WHEN THE JURY HAS REACHED A VERDICT, THE FOREPERSON MUST SIGN THIS VERDICT FORM AND SIGNAL THE U.S. MARSHALL THAT THE JURY IS READY TO RENDER A VERDICT.

Date: 8-5-08 Jury Foreperson:

[Redacted Stamp]

SHERMAN ACT § 2 - MONOPOLIZATION

WE, THE JURY, unanimously find as follows:

1. Have Plaintiffs proven by a preponderance of the evidence the existence of any relevant product market(s) within any relevant geographic market(s)? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 2 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 1 Yes ___ No _X_

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify all parties to each such agreement: _____

2. Have Plaintiffs proven by a preponderance of the evidence that the Defendant had monopoly power in any market for which you answered "Yes" to Question 1? (A "yes" answer to this question is a finding for Plaintiffs, A "no" answer is a finding for the Defendant. If "yes," proceed to question 3 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 2 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify to which relevant product and geographic market(s) this answer applies: _____

3. For each relevant product market you listed in your answer to question 2, have Plaintiffs proven by a preponderance of the evidence that Defendant willfully acquired or maintained monopoly power through exclusionary conduct without legitimate

reasons for engaging in such conduct? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 4 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 3 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify to which relevant product and geographic market your answer applies:

4. Have Plaintiffs proven by a preponderance of the evidence that the conduct for which you answered "Yes" to question 3 caused injury to the Plaintiffs in their business or property? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 5 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 4 Yes ___ No ___

(for Plaintiffs) (for Defendant)

5. For any injury you found in response to question 4, do you find by a preponderance of the evidence that any such injury to Plaintiffs was caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 6 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 5 Yes ___ No ___

(for Plaintiffs) (for Defendant)

6. For any injury for which you answered "Yes" to Question 5, do you find by a preponderance of the evidence that Plaintiffs failed to take all reasonable steps available to minimize their losses? (A "yes" answer to this question is a finding for the Defendant. A "no" answer is a finding for Plaintiffs. If "no," proceed to question 7 below and do not answer question 8. If "yes," please proceed to question 8 below and do not answer question 7.)

Question 6 Yes ___ No ___

(for Plaintiffs) (for Defendant)

7. For any injury for which you answered "No" to question 6, what is the total amount of damages that would fairly compensate Plaintiffs for this injury based on the evidence available to you? Write your answer in the line labeled "Amount" below.

8. For any injury for which you answered "Yes" to question 6, what is the total amount of damages that would fairly compensate Plaintiffs for this injury if they had taken all reasonable steps to mitigate their damages? Write your answer in the line labeled "Amount" below.

Amount:_____

WHEN THE JURY HAS REACHED A VERDICT, THE FOREPERSON MUST SIGN THIS VERDICT FORM AND SIGNAL THE U.S. MARSHALL THAT THE JURY IS READY TO RENDER A VERDICT.

Date: 8-5-08 Jury Foreperson:

[Redacted Stamp]

SHERMAN ACT § 2 - ATTEMPTED MONOPOLIZATION

WE, THE JURY, unanimously find as follows:

1. Have Plaintiffs proven by a preponderance of the evidence the existence of a relevant product market within a relevant geographic market? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 2 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 1 Yes ___ No _X_

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify all parties to each such agreement: _____

2. Have Plaintiffs proven by a preponderance of the evidence that the Defendant engaged in anticompetitive conduct with an intent to achieve monopoly power in a relevant product market within a relevant geographic market for which you answered "Yes" to Question 1? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 3 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 2 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated product and geographic market(s):

_____

3. Have Plaintiffs proven by a preponderance of the evidence that there is a dangerous probability

that the Defendant would achieve its goal of monopoly power in any relevant product market? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 4 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 3 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated product and geographic market(s):

_____

4. Have Plaintiffs proven by a preponderance of the evidence that the actions of the Defendant caused injury to the Plaintiffs in their business or property? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 5 below. If "no," please sign the jury verdict form and return it to the U.S. Marshall.)

Question 4 Yes ___ No ___

(for Plaintiffs) (for Defendant)

5. For any injury you found in response to question 4, do you find by a preponderance of the evidence that any such injury to Plaintiffs was caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant, If "yes," proceed to question 6 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 5 Yes ___ No ___

(for Plaintiffs) (for Defendant)

6. For any injury for which you answered "Yes" to question 5, do you find by a preponderance of the evidence that Plaintiffs failed to take all reasonable steps available to minimize their losses? (A "yes" answer to this question is a finding for the Defendant. A "no" answer is a finding for Plaintiffs. If "no," proceed to question 7 below and do not answer question 8. If "yes," please proceed to question 8 below and do not answer question 7.)

Question 6 Yes ___ No ___

(for Plaintiffs) (for Defendant)

7. For any injury for which you answered "No" to question 6, what is the total amount of damages that would fairly compensate Plaintiffs for this injury based on the evidence available to you? Write your answer in the line labeled "Amount" below.

8. For any injury for which you answered "Yes" to question 6, what is the total amount of damages that would fairly compensate Plaintiffs for this injury if they had taken all reasonable steps to mitigate their damages? Write your answer in the line labeled "Amount" below.

Amount: _____

WHEN THE JURY HAS REACHED A VERDICT, THE FORE PERSON MUST SIGN THIS VERDICT FORM AND SIGNAL THE U.S. MARSHALL THAT THE JURY IS READY TO RENDER A VERDICT.

Date: 8-5-08 Jury Foreperson:

[Redacted Stamp]

SHERMAN ACT § 2 - CONSPIRACY TO MONOPOLIZE

WE, THE JURY, unanimously find as follows:

1. Have Plaintiffs proven by a preponderance of the evidence the existence of a relevant product market within a relevant geographic market? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 2 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 1 Yes ___ No X

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify all parties to each such agreement: _____

2. Have Plaintiffs proven by a preponderance of the evidence that the Defendant entered into an agreement or mutual understanding to obtain or maintain monopoly power in a relevant market within a relevant geographic market? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 3 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 2 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated product and geographic market(s): _____

3. Have Plaintiffs proven by a preponderance of the evidence that the Defendant knowingly became parties to that agreement or mutual understanding?

(A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 4 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 3 Yes ___ No ___

(for Plaintiffs) (for Defendant)

4. Have Plaintiffs proven by a preponderance of the evidence that the Defendant intended that the parties to the agreement or mutual understanding would obtain or maintain monopoly power in any relevant product market within a relevant geographic market you specified in your answer to question 2? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 5 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 4 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated product and geographic market(s):

_____

5. Have Plaintiffs proven by a preponderance of the evidence that the Defendant took an overt act in furtherance of that agreement or mutual understanding? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 6 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 5 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated relevant product market(s):

_____

6. Do you find by a preponderance of the evidence that the anticompetitive actions of the Defendant caused injury to the Plaintiffs in their business or property? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 7 below. If "no," please sign the jury verdict form and return it to the U.S. Marshall.)

Question 6 Yes ___ No ___

(for Plaintiffs) (for Defendant)

7. For any injury you found in response to question 6, do you find by a preponderance of the evidence that any such injury to Plaintiffs was caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 8 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 7 Yes ___ No ___

(for Plaintiffs) (for Defendant)

8. For any injury for which you answered "Yes" to Question 7, do you find by a preponderance of the evidence that Plaintiffs failed to take all reasonable steps available to minimize their losses? (A "yes" answer to this question is a finding for the Defen-

dant. A "no" answer is a finding for Plaintiffs. If "no," proceed to question 9 below and do not answer question 10. If "yes," please proceed to question 10 below and do not answer question 9.)

Question 8 Yes ___ No ___

(for Plaintiffs) (for Defendant)

9. For any injury for which you answered "No" to question 8, what is the total amount of damages that would fairly compensate Plaintiffs for this injury based on the evidence available to you? Write your answer in the line labeled "Amount" below.

10. For any injury for which you answered "Yes" to question 8, what is the total amount of damages that would fairly compensate Plaintiffs for this injury if they had taken all reasonable steps to mitigate their damages? Write your answer in the line labeled "Amount" below.

Amount: _____

WHEN THE JURY HAS REACHED A VERDICT, THE FOREPERSON MUST SIGN THIS VERDICT FORM AND SIGNAL THE U.S. MARSHALL THAT THE JURY IS READY TO RENDER A VERDICT.

Date: 8-5-08 Jury Foreperson:

[Redacted Stamp]

APPENDIX B

Plaintiffs' Proposed Antitrust Jury Instruction 7

Antitrust Claims: Sherman Act Section 1
Rule of Reason – Quick Look

Under Section 1 of the Sherman Act, a restraint of trade is illegal if it is found to be unreasonable. You must determine, therefore whether the restraints challenged here are unreasonable. The restraints alleged here are: the channeling of players to certain events via rules, regulations, bonuses and sanctions; the creation and sale of a limited number of "sanctions" which are required if a tournament is to attract players; the pooling of broadcast and sponsorship rights; geographic market protections for favored tournaments; calendar market protection for certain tournaments; and the limitation and/or cap of output of top-tier men's professional tennis. I have determined as a matter of law that these restraints constitute horizontal market divisions, geographic market divisions and price fixing and, as such, are naked restraints of trade. The Plaintiffs have established, therefore, that the Defendants' restraints have caused substantial harm to competition in a relevant market. You must consider whether the restraint produces countervailing competitive benefits. If you find that it does, then you must balance the competitive harm against the competitive benefit. The challenged restraint is illegal under Section 1 of the Sherman Act if you find that the competitive harm outweighs the competitive benefit. I have found as a matter of law, significant competitive harm. It is

your duty to consider the competitive benefits, if any, and to balance them against this harm.[8]

Defendants' Objection

Defendants object to Plaintiffs' Proposed Jury Instruction 16 because it is not relevant to the facts and issues to be tried, because the Court has not made the determination described and the evidence at trial will not support such a determination. Defendant further object to the extent that it purports to list specific restraints that Plaintiffs have never previously alleged. Additionally, it is unnecessary and potentially confusing to repeat Plaintiffs' allegations in the context of this instruction. Furthermore, alleged restraints Nos. 1 and 2 are unreasonably argumentative, and No. 6 is unreasonably vague and undefined.

Plaintiffs' Proposed Antitrust Jury Instruction 8

Antitrust Claims: Sherman Act Section 1
Rule of Reason – Quick Look Evidence of Competitive Benefits

As I have found that Plaintiffs have proven that the challenged restraint resulted in substantial harm to competition in a relevant markets, you must determine whether the restraint also benefits competition in other ways. The only legitimate rationales that you may consider are those that are necessary to produce competitive men's professional tennis. Further, rationales relating merely to profitability or cost savings do not qualify as a pro-competitive justification.

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[8] *Law v. NCAA*, 134 F.3d 1010, 1019-21 (10th Cir. 1998); *NCAA v. Board of Regent of the University of Oklahoma*, 104 S.Ct. 2984, 2965 (1984)

In this case, Defendants contend that the challenged restraint benefits competition the following way(s): the Defendants, certain men's professional tournaments, and certain men's professional tennis players will make more money because consumers in the relevant output market(s) will pay more therein. If you find that Defendants have proven that the challenged restraint does result in competitive benefits, then you also must consider whether the restraint was reasonably necessary to achieve the benefits. If Plaintiffs prove that the same benefits could have been readily achieved by other, reasonably available alternative means that create substantially less harm to competition, then they cannot be used to justify the restraint.[9]

Defendants' Objection

Defendants object to Plaintiffs' Proposed Jury Instruction 17 because it is not relevant to the facts and issues to be tried, because the Court has not made the determination described and the evidence at trial will not support such a determination. Defendant further object on the grounds that it contains an inaccurate and argumentative characterization of Defendants' contentions as to the pro-competitive benefits of their challenged actions.

Plaintiffs' Proposed Antitrust Jury Instruction 9

Antitrust Claims: Sherman Act Section 1 Rule of Reason – Quick Look – Evidence of Competitive Benefits

If you find that the challenged restraint was reasonably necessary to achieve competitive benefits,

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[9] ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, 2005 Edition A-10 (2005).

then you must balance those competitive benefits against the competitive harm resulting from the same restraint. If the competitive harm outweighs the competitive benefits, then the challenged restraint is unreasonable. If the competitive harm does not outweigh the competitive benefits, then the challenged restraint is not unreasonable. In conducting this analysis, you must consider the benefits and harm to competition and consumers, not just to a single competitor or group of competitors.[10]

Defendants' Objection

Defendants object to Plaintiffs' Proposed Jury Instruction 18 because it is not relevant to the facts and issues to be tried, because it eliminates the requirement that the jury determine whether there has been any competitive harm. Defendants further object on the grounds that it misstates the law. Plaintiffs bear the burden of proving that the alleged competitive harm substantially outweighs the procompetitive benefits.

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[10] ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, 2005 Edition A-12 (2005).

APPENDIX C

Antitrust Jury Instruction 2

Antitrust Claims: Sherman Act Sections 1 and 2
Private Actions Under the Antitrust Laws

This type of lawsuit is known as a private antitrust civil action. Private antitrust actions are a means of enforcing the antitrust laws, because they serve to deter defendants who have violated the antitrust laws from violating the law in the future.

Plaintiffs have brought two separate antitrust claims. Plaintiffs' first claim is under Section 1 of the Sherman Act, which prohibits a person or corporation from entering into contracts, combinations and conspiracies that unreasonably restrain trade. Plaintiffs allege that Defendants entered into agreements, combinations and conspiracies to restructure men's professional tennis that unreasonably restrained trade in the market(s) for top-tier men's professional tennis, player services for top-tier men's professional tennis, and/or sanctions for top-tier men's professional tennis.

Plaintiffs' second claim is under Section 2 of the Sherman Antitrust Act, which prohibits a person or a corporation from maintaining a monopoly in any part of our country's trade or commerce. In this case, Plaintiffs allege that Defendants unlawfully gained and maintained a monopoly in the relevant market(s); conspired to gain and maintain a monopoly in the relevant market(s); and attempted to gain and maintain a monopoly in the relevant market(s).

Antitrust Jury Instruction 13

Rule of Reason – Proof of Relevant Market

As I mentioned, Plaintiffs must show that the harm to competition occurred in an identified market, known as a "relevant market." There are two aspects to a relevant market. The first aspect is known as a relevant product market. The second aspect is known as the relevant geographic market. It is Plaintiffs' burden to prove the existence of a relevant market.

Relevant Product Market

The basic idea of a relevant product market is that it includes all products that are reasonable substitutes for each other from a buyer's point of view; that is, the products compete with each other. In other words, the relevant product market includes the products that a consumer believes are reasonably interchangeable or reasonable substitutes for each other. This is a practical test with reference to actual behavior of buyers and marketing efforts of sellers. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes. For example, if consumers seeking to cover leftover food for storage considered certain types of flexible wrapping material – such as aluminum foil, cellophane, or even plastic containers – to be reasonable alternatives, then all those products would be in the same relevant product market.

To determine whether products are reasonable substitutes for each other, you should consider whether a small but significant permanent increase in the price of one product would result in a substantial number of consumers switching from that product to another. Generally speaking, a small but permanent increase in price is approximately a five percent increase in

price not due to external cost factors. If you find that such switching would occur, then you should conclude that the products are in the same product market.

In evaluating whether various products are reasonably interchangeable or are reasonable substitutes for each other, you may also consider: (1) consumers' views on whether the products are interchangeable; (2) the relationship between the price of one product and sales of another; (3) the presence or absence of specialized vendors; (4) the perceptions of either industry or the public as to whether the products are in separate markets; (5) the views of Plaintiffs and Defendants regarding who their respective competitors are; and (6) the existence or absence of different customer groups or distribution channels.

In this case, Plaintiffs define the relevant product markets as the market for the production of top-tier men's professional tennis, the market for player services for top-tier men's professional tennis, the market for hosting top-tier men's professional tennis, and/or the market for live top-tier men's professional tennis. By contrast, Defendants assert that Plaintiffs have failed to prove a proper relevant product market because Defendants claim that Plaintiffs' alleged product markets do not include all reasonably interchangeable products or substitutes. If you find that Plaintiffs have proven a relevant product market or markets that includes all reasonably interchangeable products or substitutes, then you should continue to evaluate the remainder of Plaintiffs' claim with respect to that market or those markets. However, if you find that Plaintiffs have failed to prove such a market, then you must find in Defendants' favor on this claim.

Relevant Geographic Market

For each relevant product market you determine that Plaintiffs have proven, Plaintiffs must also prove a relevant geographic market. The relevant geographic market for a given relevant product market is the area in which the defendant faces competition from other firms that compete in that relevant product market and to which customers can reasonably turn for purchases. When analyzing the relevant geographic market, you should consider whether changes in prices or product offerings in one area have substantial effects on prices or sales in another area, which would tend to show that both areas are in the same relevant geographic market. The geographic market may be as large as global or nationwide, or as small as a single town or even smaller. The relevant geographic market for one relevant product market may be larger or smaller than that for a different relevant product market.

Plaintiffs have the burden of proving the relevant geographic market by a preponderance of the evidence. In this case, Plaintiffs claim that the relevant geographic market for each of these markets is global. By contrast, Defendants assert that Plaintiffs have failed to prove a proper geographic market. In determining whether Plaintiffs have met their burden and proven that their proposed geographic market is proper, you may consider several factors, including:

- The geographic area in which the relevant products are sold and where customers for the relevant products are located;
- The geographic area to which customers turn for supply of the relevant products or have seriously considered turning; and

- The geographic areas that suppliers of the relevant products; view as potential sources of competition.

Antitrust Jury Instruction 18

Antitrust Claims: Sherman Act Section 2 – Monopolization General Elements

Plaintiffs allege that they were injured by the Defendants' unlawful monopolization of the markets for top-tier men's professional tennis; player services for top-tier men's professional tennis; and sanctions for top-tier men's professional tennis tournaments. To prevail on this claim, Plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence:

First, that the alleged market is a valid antitrust market;

Second, that the ATP Tour possessed monopoly power in that market;

Third, that the Defendants "willfully" acquired or maintained monopoly power in that market by engaging in anticompetitive conduct; and

Fourth, that the Plaintiffs were injured in their business or property because of the Defendants' anticompetitive conduct.

If you find that Plaintiffs have failed to prove any of these elements as to any Defendant, then you must find for that Defendant and against Plaintiffs on this claim. If you find that Plaintiffs have proved each of these elements by a preponderance of the evidence, then you must find for Plaintiffs and against Defendants on this claim.

Antitrust Jury Instruction 24

Antitrust Claims: Sherman Act Section 2 - Attempt to Monopolize General Elements

Plaintiffs allege that they were injured by Defendants' unlawful attempt to monopolize the markets for top-tier men's professional tennis; player services for top-tier men's professional tennis; and sanctions for top-tier men's professional tennis tournaments. To prevail on its claim of attempted monopolization, Plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence:

First, that Defendants engaged in anticompetitive conduct.

Second, that Defendants had a specific intent to achieve monopoly power in a relevant market;

Third, that there was a dangerous probability that Defendants would achieve their goal of monopoly power in the relevant market; and

Fourth, that Plaintiffs were injured in their business or property by Defendants' anticompetitive conduct.

If you find that the evidence is insufficient to prove any one or more of these elements against any specific Defendant, then you must find for Defendants and against Plaintiffs on Plaintiffs' claim of attempted monopolization. If you find that the evidence is sufficient to prove all four elements as to a Defendant, then you must find for Plaintiffs and against that Defendant on Plaintiffs' claim of attempted monopolization.

Antitrust Jury Instruction 27

Antitrust Claims: Sherman Act Section 2 - Conspiracy to Monopolize' General Elements

Plaintiffs allege a conspiracy to monopolize in violation of Section 2 of the Sherman Act, which declares unlawful every conspiracy to monopolize interstate or foreign commerce.

To prevail against Defendant(s) on their claim of conspiracy to monopolize, Plaintiffs have the burden of proving by a preponderance of the evidence as to Defendant(s) each of the following elements:

First, that an agreement or mutual understanding between two or more persons to obtain or maintain monopoly power in the market(s) for top-tier men's professional tennis, player services for top-tier men's professional tennis, and sanctions for top-tier men's professional tennis tournaments;

Second, that Defendant(s) knowingly - that is, voluntarily and intentionally - became a party to that agreement or mutual understanding;

Third, that Defendant(s) specifically intended that the parties to the agreement would obtain or maintain monopoly power in the market(s) for top-tier men's professional tennis, player services for top-tier men's professional tennis, and sanctions for top-tier men's professional tennis tournaments;

Fourth, that Defendant(s) committed an overt act in furtherance of the conspiracy;

Fifth, that Defendant's (or Defendants') activities occurred in or affected interstate or foreign commerce; and

Sixth, that Plaintiffs were injured in their business or property because of the conspiracy to monopolize.

If you find that the evidence is sufficient to prove each element as to a Defendant, then you must find for Plaintiffs and against that Defendant on Plaintiff's' conspiracy to monopolize claim. If you find that the evidence is sufficient to prove each element as to a defendant, then you must find for Plaintiffs and against that defendant on Plaintiff's' conspiracy to monopolize claim.

APPENDIX D

7/30/2008 Transcript of Trail (Day 8)

[JA 1729] Now, as this goes forward, the one thing I want to address is, you know, I listened yesterday, as you did, of course, too, and this comment of what happened, he was being asked about what about this market for fans? Well, there was an exchange about this Cincinnati/Washington. Well, okay, there was. But that is not our lawsuit. We're not focusing on those.

But as we get here, what we have, I have to say this is an immensely complicated area of the law. It's an immensely complicated area of just getting your mind around the economic principles involved. And I have to say I go to bed at night sometimes and I have to start over. What is Point A? What is Point B? What is Point C in the analysis, honest to God. It is that complex. And then you have courts doing their absolute best with it to see that parties are treated fairly on both sides of the case in terms of the law and the economics and the evidence. And I think we all know it is extremely subtle and it needs an extremely careful and nuanced analysis.

But that goes to the point that I think is of the essence here. There needs to be, I think the Court needs to hear from Dr. Walker and you need to hear how

Dr. Walker goes about his work. And I think that may help you understand how another economist goes about a methodology. And you may see things may become more clear

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8/2/2008 Transcript of Trial (Day 10)

[JA 2090] "Answer: I do not believe that ATP would have over the course of so many years left the Hamburg Tournament in its standing the way it was in May if ATP had not, like me, believed that that was the only logical consequence in the calendar of events on the way to Paris, to the Paris Tournament.

"Question: Would you agree there could be other logical calendars that one could create? Yes?

"Answer: I would have to be convinced, I don't see any other – any other logical calendar.

"Question: As part of how the tour should go forward, is it your view that Hamburg should continue to be a Masters series event and should receive a thousand points?

"In your view of how the tour should go forward, how should Hamburg be treated?

"Answer: If I were in Mr. de Villiers's position and looked at the overall European tennis and I weren't German, I would still be in favor of Hamburg because even in that case – so even if I were not a German, if I were an Austrian or an Italian, I would still be in favor of Hamburg because I would still think that Hamburg fits into this Masters Series circuit.

"Question: And you would be in favor of continuing a Masters Series?

"Answer: Yeah, I'm struggling, battling for the [JA 2091] resumption of Hamburg as a 1000 event, as a Masters event in May.

"Question: And as part of that you would want Hamburg to be the only event during its tournament week?

"Answer: Yes, I want the player tournament—the player commitment, excuse me, to continue as it was before, that is that the top players commit to playing that Masters Series.

"Question: And would you want Hamburg to have the benefit of the player commitment that is being proposed for the 1000 events starting in 2009?

"Answer: Yes, exactly. That's how I understand the plan, namely, that the players would have to commit to these 1000 events as a precondition of the 1000 events to take place.

"Question: With respect to which tournaments in German did you plead that they should not pay any appearance fees?

"Answer: I actually pleaded with all tournament organizers in Germany. I mean I told them that in my opinion that's the wrong way to go, but it was my opinion at the time.

"Question: Is that still your opinion?

"Answer: I am against appearance fees. That's why I'm so adamant about keeping the 1000 tournaments, [JA 2092] because it enables us to force the players to play without appearance fee.

(Deposition ends.)

. . . PETER R. GREENHALGH, having been duly sworn as a witness, was examined and testified as follows . . .

DIRECT EXAMINATION

BY MR. UNDERWOOD:

Q. Good afternoon, Mr. Greenhalgh. Could you please tell the jury what your profession is?

A. Yes. I am an economist.

Q. Do you have a particular area of focus within the broad discipline of economics?

A. Yes. I principally am what is called a micro-economist, someone who studies firms and industries. And within that broad field, my real specialty is called industrial organization, which is the specific study of firms and industries.

And even within that field, my most narrow specialty is really antitrust economics, as well as the computation of damages, both in antitrust cases and in other cases.

Q. Could you please describe your educational background?

A. Yes. I have a Bachelor's degree in mathematics from Princeton University. I then spent four years in graduate

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